STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

LUTHER STRANGE
ATTORNEY GENERAL

501 WASHINGTON AVENUE
P.O. BOX 300152
MONTGOMERY, AL 36130-0152
(334) 242-7300
WWW.AGO.STATE.AL.US

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The National Indian Gaming Commission
1441 L Street, NW Suite 9100
Washington, DC 20005

Dear Commission Members:

Thank you for the opportunity to provide comment to the National Indian Gaming Commission concerning the Commission's proposed revisions to 25 CFR Part 543 Minimum Internal Control Standards for Class II Games and Part 547 Minimum Technical Standards for Gaming Equipment Used in the Play of Class II Games. On February 11, 2011, I urged you to use your comprehensive review of existing regulations to "make clear that Native American Indian tribes located in Alabama cannot engage in gambling activities that are patently illegal under Alabama law." After reviewing the discussion drafts for Part 543 and Part 547, I fear that the Commission may miss an important opportunity to do just that.

Slot machines cannot be operated by a Native American Indian tribe on land located in a State like Alabama that has not agreed to a compact with that tribe. As you know, when Congress enacted the Indian Gaming Regulatory Act ("IGRA"), it envisioned two distinct types of gaming – the traditional game of bingo on the one hand and casino halls filled with slot machines on the other. *See, e.g.*, Disapproval Letter from Commissioner Philip Hogen to Mayor Karl S. Cook at 7 (June 4, 2008). That is why IGRA distinguishes between "technological aids" that may be used with Class II games like bingo, which can be operated without a compact, and Class III games such as "slot machines," which cannot be operated without a compact. In fact, IGRA expressly provides in no uncertain terms that "'class II gaming' does not include . . . electronic or electromechanical facsimiles of any game of chance or slot machines *of any kind*." 25 U.S.C. § 2703(7)(b)(2) (emphasis added).

After IGRA was enacted, slot machine manufacturers and tribes went to great lengths to conflate Class III slot machines with *bona fide* "technological aids" used to play the traditional game of Class II bingo. By 2006, this Commission was rightly "concerned that the industry is dangerously close to obscuring the line between Class II and III" altogether. *See* Proposed Rule, 25 CFR Part 502 and 546, Classification Standards, Class II Gaming, Bingo, Lotto, et al., 71 Fed. Reg. 30238 (May 25, 2006). For that reason, the Commission proposed the regulations that eventually became Part 543 and Part 547 as part of a package of reforms designed to enforce the

statutory distinction between Class II and Class III games. *Id.* Although I do not agree with each and every element of those proposed reforms, I do agree with the Commission's original goal of enforcing IGRA's clear line between Class II and Class III games.

Unfortunately, the Commission gutted those reforms. It abandoned any effort to enforce the statutory line between "technological aids" and "facsimiles" of games of chance through a meaningful regulation. Instead, the Part 543 and Part 547 that were ultimately enacted "do not attempt to draw such a line" between Class II and Class III gambling devices, but simply "assume that such a line already exists." 73 Fed. Reg. 60523 (Oct. 10, 2008). When it failed to adopt the proposed regulation, the Commission promised to "address . . . classification issues through a combination of training, technical assistance, and enforcement actions." *See* Withdrawal of Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming When Played Through an Electronic Medium Using "Electronic, Computer, or Other Technologic Aids," 73 Fed. Reg. 60490, 60491 (Oct. 10 2008).

Given this background, I have four specific comments on the Commission's current discussion drafts of Part 543 and Part 547.

First, the Commission's minor edits to Part 543 and Part 547 do nothing to give teeth to the important distinction between Class II "technological aids" and Class III slot machines. The main problem when these regulations were first proposed was the proliferation of Class III slot machines under the guise of Class II "technological aids," but Part 543 and Part 547 as they presently exist have done little to solve it. In Alabama, the Poarch Band of Creek Indians operate three Indian casinos that offer ostensibly Class II gambling that approximates the same kind of slot machine gambling that one might find in Las Vegas or Atlantic City.[1] The Tribe's ability to "obscure[] the line between Class II and III" makes it harder for my office to enforce Alabama law outside of Indian land. Alabama citizens are understandably confused when Indian tribes are allowed to call their Class III slot machines "bingo," but gambling promoters within the State's jurisdiction cannot use the same gimmick. The solution to this problem is *not* for my office to relax or disregard the State of Alabama's gambling laws; the solution is for the Commission to strictly enforce federal law on Indian lands.

Instead of the minor changes that the Commission has proposed, I believe that the Commission should consider returning to the Class II classification standards that were originally proposed as a complement to Part 543 and Part 547. When the Commission withdrew the classification standards from its 2006 rulemaking proposal, the Commission believed that it could compel compliance with IGRA through enforcement actions instead. But, after reviewing the Commission's enforcement actions since 2006 on the Commission's website, my office has not uncovered a single action related to the difference between Class II and Class III games or

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[1] The State concedes neither that the Poarch Band of Creek Indians is a proper-recognized tribe nor that the Department of the Interior had authority to take land into trust for the Tribe. *See Carcieri v. Salazar*, 555 U.S. 379, 387-388 (2009). But those issues are outside the scope of this comment.

the use of "technological aids." The Commission's lax enforcement is particularly troubling because, in 2008, the Commission warned that the problems arising from tribes' "exploitation of technology [that] erases, or is perceived to erase" the Class II/Class III distinction could be serious enough to compel action by the Department of Justice or Congress or both. *See* 73 Fed. Reg. at 60491. Were the Commission strictly enforcing the already-existing statutory distinction between "technological aids" and "electronic or electromechanical facsimiles," I would agree that regulatory classification standards would be unnecessary. But the Commission is not strictly enforcing IGRA.

Second, the Commission's reasons for withdrawing its classification standards from the original reform package were based on inaccurate information about Alabama. In withdrawing the previously proposed classification standards, the Commission cited the "terrific economic costs" that its reform would have on Indian gaming, "as set out in its two economic impact reports." 73 Fed. Reg. at 60491. But the Commission's economic impact report wrongly concluded that requiring the Poarch Band of Creek Indians to comply with IGRA would make the Tribe's gambling devices "inferior" to other gambling devices that, the Commission believed, were legal in Alabama, such as "electronic bingo machines at greyhound racetracks and sweepstakes machines." Alan Meister, *The Potential Economic Impact of the October 2007 Proposed Class II Gaming Regulations* 27 (Feb. 1, 2008) at http://www.nigc.gov/Portals /0/NIGC%20Uploads/lawsregulations/proposedamendments/MeisterReport2FINAL2108.pdf. *See also* 73 Fed. Reg. at 60491 (erroneously stating that the State of Alabama has "expand[ed] legalized gaming within [its] own borders"). In fact, the Alabama Supreme Court has held that so-called sweepstakes machines and electronic bingo machines are *illegal*. *See Barber v. Jefferson County Racing Ass'n, Inc.*, 960 So. 2d 599 (Ala. 2006) (so-called sweepstakes machines); *Barber v. Cornerstone Community Outreach, Inc.*, 42 So. 3d 65 (Ala. 2009) (so-called electronic bingo machines). So enforcing the distinction between Class II and Class III gambling would not disadvantage the Poarch Band of Creek Indians in comparison with other Alabama residents.

Third, the discussion draft of Part 547 continues to state that "[n]othing in this part shall be construed to grant to a state jurisdiction over Class II gaming." But IGRA intended to grant the States considerable influence over Class II gaming. In fact, IGRA expressly conditions the legality of Class II gaming on whether that gaming is allowed under state law. As I made clear in my February 11th letter, "[i]t would make no sense for federal law to provide that the fundamentally different game of 'electronic bingo' is legal on Indian land simply because Alabama law allows the traditional game of bingo to be played for certain charitable purposes on certain non-Indian lands." The Commission should consider incorporating State standards and enforcement mechanisms into Part 543 and Part 547. If the Commission gave the States authority to enforce IGRA on Indian lands, I would put a stop to Class III slot machines masquerading as Class II "technological aids."

Fourth, at the very least, the Commission's regulations should not actively engender confusion between slot machines and Class II "technological aids." Unfortunately, that is what the discussion draft of Part 547 does when it contemplates that Class II "technological aids" will

be materially indistinguishable from slot machines. The Commission's "Minimum Technical Standards for Gaming Equipment Used in the Play of Class II Games" apply to a Class III slot machine just as naturally as they apply to a Class II bingo ball blower. For example, Part 547 allows Class II gambling devices to accept and dispense bills and coins into the face of the gambling device, *see* 547.7(g) & (k), defines "player interface" to include a "terminal" through which a player interacts with the automated game, *see* 547.2, and contemplates that the player may be notified of the results of the game through an "entertaining display," 547.9(d)(1). These are elements of slot machine gambling. *See, e.g.,* Ala. Code 13A-12-20(10)(defining slot machine as "[a] gambling device that, as a result of the insertion of a coin or other object, operates, either completely automatically or with the aid of some physical act by the player, in such a manner that, depending upon elements of chance, it may eject something of value."); *MDS Investments, L.L.C. v. State*, 65 P.3d 197, 203 (Idaho 2003) ("Considering the technological changes, a slot machine is a gambling device which, upon payment by a player of required consideration in any form, may be played or operated, and which, upon being played or operated, may, solely by chance, deliver or entitle the player to receive something of value, with the outcome being shown by spinning reels or by a video or other representation of reels."). To the extent Part 547 authorizes or has been interpreted by the Commission to authorize the play of slot machines "of any kind" under the guise of Class II bingo, it exceeds the Commission's authority under IGRA.

In short, the status quo is unacceptable. Because the Commission has previously told me that I do not have authority over gambling conducted on Indian lands, I am requesting that the Commission act to enforce the bright line between Class II and Class III gambling that already exists in federal law. The Commission's regulations should either give me the authority to enforce the law or make clear that gambling devices that look and operate like slot machines are "facsimiles" of games of chance under IGRA, regardless of whether they purport to aid in playing the game of "bingo."

If the Commission needs any further comment or information related to this matter, do not hesitate to contact my office.

Sincerely,

Luther Strange

LUTHER STRANGE
ATTORNEY GENERAL

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